No. 82-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES DYRAL BRILEY,
Petitioner,

v.

DIRECTOR OF THE DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court for the Commonwealth of Virginia

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REPLY BRIEF FOR PETITIONER

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April 21, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

I. This Court Should Grant Certiorari to Clarify the Extent to Which Instructions Are Necessary in a Capital Case to Guide and Channel the Discretion of the Jury

The Commonwealth's brief confirms the need for guidance from this Court on the question of whether sentencing instructions which merely repeat the bare words of the aggravating circumstances provision in a death penalty statute—but omit the mitigating circumstances provisions—are sufficient to channel the discretion of the jury in a capital case.

The Commonwealth contends that a mere reading of some portions of the statute, with only passing reference to mitigation, suffices. Petitioner submits that *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980), requires a state to do more, and not only "tailor [but also] *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (Emphasis added.)

Respondent relies in part on *Jurek* v. *Texas*, 428 U.S. 262 (1976). (Brief in Opp. at 5.) But *Jurek* related to the *facial* validity of a Texas death penalty statute and did not even address the question of the instructions necessary for constitutional application of such a statute. As we demonstrate in the Petition, the instructions question is currently the subject of considerable confusion in the state supreme courts and the lower federal courts, (Petition at 7-10),[1] and deserves this Court's clarification.

The Commonwealth, in arguing that instructions are unnecessary, goes so far as to claim that any instruction on mitigating circumstances could "run afoul" of *Lockett* v. *Ohio*, 438 U.S. 586 (1978). (Brief in Opp. at 8.) The Commonwealth's reliance on *Lockett* is ironic; *Lockett* held that a jury's consideration of mitigating factors could not be limited, but the trial court in this case never even told the jury that it was obliged to consider mitigating factors.

The Commonwealth quotes that portion of the Virginia death statute which states that "Facts in mitigation may include, *but shall not be limited to*, the following . . . ." (emphasis supplied by respondent) and contends that this provision "permits the jury to consider any evidence proffered by the defendant in mitigation, and clearly meets the requirements of *Lockett*." (Brief in Opp. at 8.) But *this provision was never read to the jury*. Nor was

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[1] *See also Balkcom* v. *Goodwin*, No. 82-1409, *cert. denied*, 51 U.S.L.W. 3750 (April 19, 1983) (ruling below: instructions that do not clearly guide jury in its understanding of mitigating circumstances and option to recommend life sentence violate U.S. Constitution).

the jury ever told that its consideration of mitigating evidence was to be unlimited. The jury was not even told what might constitute mitigating evidence.

Certiorari should be granted so that the Court might clarify what the jury must be told concerning aggravation and mitigation in a death penalty case.

II. Petitioner's Claims Were Preserved in the Virginia Supreme Court and Are Properly Before this Court

Every one of the claims raised in this petition was raised in the state habeas corpus proceeding and appealed to the Virginia Supreme Court.[2] With respect to the inadequacy of the trial court's instructions on the application of the Virginia death penalty statute, and the *Witherspoon* claim, petitioner's Petition for Appeal to the Virginia Supreme Court stated (at 43): "These claims deserved the full attention of the Circuit Court *and should be heard on appeal by this Court.*" (Emphasis added.)

Respondent's reliance upon *Beck* v. *Washington*, 369 U.S. 541 (1962), *Ferguson* v. *Georgia*, 356 U.S. 570 (1961), and *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238 (1902), is misplaced, since these cases dealt with claims which had not been raised at all in the state trial court or the state supreme court. *Godchaux Co.* v. *Estopinal*, 251 U.S. 179 (1919), is equally inapposite, for in that case the claim had not been raised at trial and

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[2] With respect to the instructions question, the habeas corpus petition alleged:

> "The trial court failed adequately to instruct the jury concerning the aggravating and mitigating circumstances, as a result of which the jury's discretion was unchanneled and the imposition of the death sentence by such an uninstructed and unguided jury constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, § 9 of the Constitution of Virginia." (Amended Habeas Petition at 17.)

was raised below for the first time in an application for rehearing to the state supreme court.

III. The Undisputed Facts Present a Clear *Miranda* Violation

Petitioner's *Miranda* claim is based upon two facts, neither of which the Commonwealth disputes. *First*, petitioner requested an attorney on the night of his arrest. *Second*, the police continued to question petitioner after he had requested an attorney.

Petitioner's *Miranda* claim is not based upon any challenged testimony, or upon the credibility of any witness. This claim merits summary reversal for the reasons previously stated.[3]

* * * *

For the reasons set forth above and in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[3] It must be noted that the habeas court and the Virginia Supreme Court did not base their ruling on the credibility of the testimony. Rather, they based their rulings on a finding of a knowing and voluntary waiver. (*See* Petition at 18.)